The Guard Publishing Company, d/b/a The Register Guard *and* Teamsters Local Union No. 206, affiliated with the International Brotherhood of Teamsters, AFL–CIO. Cases 36–CA–8721 and 36–CA–8759

July 28, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 5, 2001, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found that the Respondent violated the National Labor Relations Act by granting a wage increase; soliciting employee grievances and promising to remedy them; soliciting employees to withdraw their authorizations for the Union; creating the impression of surveillance; and discharging employee Kama Cox. He also found that the Union represented a majority of the Respondent's employees in an appropriate unit and that a *Gissel*[4] bargaining order was warranted to remedy the Respondent's unfair labor practices.[5] As set out below, we adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by granting a wage increase, soliciting employees' grievances and promising to remedy them, and soliciting employees to withdraw their union authorizations. However, for the reasons explained below, we reverse the judge's findings that the Respondent unlawfully created the impression of surveillance and unlawfully discharged Cox. We also find that a *Gissel* bargaining order is not necessary to remedy the Respondent's unfair labor practices, and we, therefore, dismiss the 8(a)(5) allegations.

I. THE WAGE INCREASE

The Respondent is a newspaper publisher in Eugene, Oregon. It employs approximately 60 employees in its distribution department. Some of them contacted the Union in May 2000,[6] and approximately 25 employees met with the Union on May 30. Twenty-four employees signed petitions authorizing the Union to represent them at that meeting, and some of those employees then took the petitions to work to get their coworkers to sign.

On May 31, the Respondent's editor and publisher, Tony Baker, sent a letter to all bargaining unit employees. The letter stated: "It has been brought to my attention that a few employees have been talking about representation by a union." On that same day, the Respondent announced a June 1 meeting.[7] The meeting was led by Baker; other high-level supervisors were also present. At this meeting, Director of Human Resources Cynthia Walden told employees they would be receiving wage increases effective June 11.

The judge found that the Respondent violated Section 8(a)(1) of the Act by granting this wage increase. We agree but do not rely, as did the judge, on the size of the wage increase or on a presumption that increases granted during an organizing campaign are unlawful. Rather, we infer improper motive and interference with employee Section 7 rights from all of the other evidence set forth by the judge and the Respondent's failure to present a persuasive business reason demonstrating that the timing of the grant of benefits was governed by factors other than the union campaign. *Montgomery Ward & Co.*, 288 NLRB 126 fn. 6 (1988), enf. denied on other grounds 904 F.2d 1156 (7th Cir. 1990). Indeed, there was no evidence that the raises were decided upon prior to the Respondent's knowledge of the employees' union activities. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB No. 124, slip op. at 5 (2004) (where employer offers no credible explanation for pay raise during union campaign and no prior history of raise, raise unlawful).

[1] No exceptions were filed to the judge's dismissal of allegations that (1) a statement in the Respondent's June 16, 2000 letter to employees created the impression of surveillance of employees' union activities and (2) the Respondent interfered with employees' union activities by serving pizza at the June 1, 2000 meeting.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[4] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[5] The judge further found that the Respondent violated Sec. 8(a)(5) of the Act by refusing to bargain with the Union and by refusing to provide the Union with requested relevant information.

[6] All dates hereafter are 2000, unless otherwise indicated.

[7] The evidence shows that this meeting was previously unscheduled and was announced to bargaining unit employees on May 31, the day after the Union's first meeting. The bargaining unit consists of all employees working in the Respondent's distribution department.

II. SOLICITING EMPLOYEE GRIEVANCES AND PROMISING TO REMEDY THEM

The judge found that the Respondent violated Section 8(a)(1) of the Act by soliciting employees' grievances and promising to remedy them. The Respondent argues that no actual promises were made to remedy employees' complaints. We agree with the judge that the Respondent solicited grievances, promised to look into those grievances, and, in fact, remedied a specific complaint raised by employees by adding two new "core" positions.[8]

As noted above, the Union's organizing campaign began in late May, and on June 1, Baker led a meeting for all bargaining unit employees. After Human Resources Manager Walden announced the wage increase, she asked employees what concerns they had. Employees expressed complaints regarding employee drug testing, the hours of "additional" employees, wages, and training. Employees also stated that they wanted more "core" positions, since only "core" employees receive benefits. Baker informed the group of employees that he would look into these concerns.

On June 7, Baker sent a letter to distribution employees about the complaints raised at the June 1 meeting. In the letter, Baker stated that Distribution Manager Tom Strub would look into the concerns about training and additional "core" positions. The letter specifically referred to the Union's organizing campaign, stating that "[c]reating a union between you and the management of this Company will not assure you of any more or any faster response to your concerns." A "suggestion form" was enclosed with the letter, and employees were encouraged to submit any thoughts and concerns they had been unable to share or believed the Respondent should hear.

Around the same time, Distribution Manager Strub and Human Resources Supervisor Jerry LaCamp met with four unit employees to further discuss employee concerns. Employee Bradley Barnhart testified that Strub and LaCamp said that they wanted to discuss the possibility of creating additional "core" positions. Following this meeting, the Respondent created two new technical support "core" positions. Two assembler "core" employees were promoted to the technical support positions, and two "additional" employees were promoted to the "core" positions the assemblers had vacated.

As the judge recognized, absent a prior practice of doing so, an employer's solicitation of grievances during a union campaign, accompanied by a promise, express or implied, to remedy such grievances, creates an inference that the employer is promising to redress the problems. *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001). The inference that an employer that solicits grievances in a preelection setting will remedy such grievances is rebuttable. *Uarco Inc.*, 216 NLRB 1, 2 (1974). That inference has not been rebutted here. Indeed, at the June 1 meeting, the Respondent not only solicited grievances and promised to look into the employees' concerns, it followed up with its June 7 letter further soliciting grievances and informing employees that a manager would address two of their specific concerns. Thereafter, the Respondent affirmatively remedied one of the employees' major concerns by creating two "core" positions. Further, there is no evidence in the record that the Respondent had previously held similar meetings to solicit employees' concerns about their working conditions. Several employees testified that this meeting was referred to as an "emergency" meeting. Employee Barnhart testified that it had been months since the last employee meeting had been held and that such meetings were not regularly held.

Thus, we find that the record supports the judge's conclusion that the Respondent solicited employees' grievances and promised to remedy them in violation of Section 8(a)(1) of the Act.

III. SOLICITING EMPLOYEES TO REVOKE THEIR UNION AUTHORIZATIONS

The judge found that the Respondent violated Section 8(a)(1) of the Act by providing employees with unsolicited advice and assistance to withdraw their union authorizations at the same time that it was engaging in other unfair labor practices. We agree.

In letters dated June 7 and 16, Baker advised employees of their right to have their signatures withdrawn from the petitions they had signed authorizing the Union to represent them in collective bargaining. In the June 16 letter, Baker enclosed a form addressed to the Union that employees could fill out to revoke their prior authorizations.

"An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *R. L. White Co.*, 262 NLRB 575, 576 (1982) (footnote omitted). However, an employer may not "exceed the permissible bounds of providing ministerial or passive aid in withdrawing from union membership."

[8] The Respondent employs "core" employees and "additional" employees. In general, "core" employees work full time and receive company benefits, while "additional" employees work part time and do not receive benefits. There are two types of "core" employees: assemblers and technical support employees.

Chelsea Homes, 298 NLRB 813, 834 (1990), enfd. mem. 962 F.2d 2 (2d Cir. 1992) (violation when employer provided sample form and preaddressed envelope). The Board may also find such advice unlawful in the context of an employer's commission of other unfair labor practices. *L'Eggs Products, Inc*., 236 NLRB 354, 389 (1978), enfd. in relevant part 619 F.2d 1337 (9th Cir. 1980) (employer's soliciting employees to revoke authorization cards was made in "inhibiting setting" because it was done "in the context of a campaign of interrogations and threats").

Here, the Respondent did more than inform employees of their right to revoke their cards—it enclosed a sample form with its June 16 letter for employees to use to revoke their union authorizations. Further, the Respondent committed other unfair labor practices close in time to soliciting employees to revoke their support for the Union. In this regard, the Respondent's June 16 letter was sent within 2 weeks of the Respondent's unlawful solicitation of grievances and within 1 week of the June 11 wage increase that dampened existing support for the Union. In these circumstances, we find that the Respondent's June 16 letter soliciting employees to withdraw their union authorizations constituted a violation of Section 8(a)(1) of the Act.[9]

IV. CREATING THE IMPRESSION OF SURVEILLANCE

The judge found that the Respondent created the impression of surveillance of its employees' union activities when Baker stated in his June 7 letter to employees: "I am encouraged that some employees have already requested that their union signature cards be withdrawn." The judge found that this statement cited no source for Baker's knowledge that some employees had asked that their signature cards be withdrawn, and, thus, it tended to restrain and coerce employees by reasonably giving them the sense that their union activities were under surveillance by the Respondent. We disagree.

The Board's "test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance." *Flexsteel Industries*, 311 NLRB 257, 257 (1993). We find that the General Counsel has not established that reasonable employees would view this statement as implying that the Respondent was monitoring their union activities. In its June 16 letter to employees, the Respondent stated: "Several Distribution Department employees have shared with their supervisors that those pushing the union petition have refused to remove their signature at their request." The judge found this statement lawful, explaining that it did "nothing more than report what employees told supervisors."[10] We find that the General Counsel has not shown that it is likely that reasonable employees would draw a different conclusion about the statement in the June 7 letter.[11] In any event, any ambiguity was clarified on June 16 when the Respondent made it clear that its knowledge came from employee statements to supervisors. Accordingly, we dismiss this allegation.

V. DISCHARGE OF KAMA COX

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Kama Cox. We disagree.

Cox worked for the Respondent from September 21, 1999, until her resignation on January 19, 2000. She was rehired and recommenced work on April 6, 2000. She was fired on June 13—2 months into a 6-month probationary period.

As noted above, the Union's organizing campaign began in late May. On May 30, at a union meeting, Cox was 1 of approximately 24 employees to sign petitions authorizing the Union to represent them. She was one of five members of the Union's organizing committee. Several employees who attended this meeting took petitions with them to get other employees to sign. Cox did not take one of these petitions. On June 10, the Union mailed invitations to all unit employees for a pizza party to be held at the union hall on June 14. These invitations listed the names of the five-member organizing committee, including Cox, and they were delivered to employees at their homes on June 12. On the following day, June 13, Cox was fired for failing her probationary period.

We apply the Board's *Wright Line* test[12] to determine if the Respondent's discharge of Cox violates Section 8(a)(3) of the Act. Under this test, the General Counsel bears the initial burden of proving by a preponderance of the evidence that protected activity was a motivating factor in the employer's actions. To meet this burden, the General Counsel must offer evidence of union or other protected activity, employer knowledge of this ac-

[9] Given our finding that the June 16 letter constituted a violation of Sec. 8(a)(1), we need not decide whether the June 7 letter by itself unlawfully solicited employees to withdraw their union authorizations.

[10] As noted above, no exceptions were filed to the judge's dismissal of this 8(a)(1) allegation.

[11] Our colleague disagrees, finding nothing in the June 7 letter to suggest that this information was a matter of public knowledge. We find nothing in the letter to suggest that the information was gathered through the surveillance of employees' union activities. Baker's statement suggests only that someone had brought this information to the Respondent's attention.

[12] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

tivity, and the existence of antiunion animus.[13] If the General Counsel meets his burden, the burden shifts to the respondent to prove, by a preponderance of the evidence, that it would have taken the same action, even in the absence of protected activity.

The General Counsel has shown that Cox was a member of the Union's organizing committee. However, we find that he has not established that the Respondent was aware of such activity. The judge and our dissenting colleague acknowledge that, on these facts, there is no direct evidence that the Respondent knew of Cox's union activity. They rely instead on circumstantial evidence, including (1) the Respondent's general knowledge of its employees' union activities; (2) the Respondent's antiunion animus; (3) the timing of Cox's discharge; and (4) alleged disparate treatment against Cox. It is true that, in an appropriate case, knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. See *Kajima Engineering & Construction*, 331 NLRB 1604 (2000), and cases cited therein. This is not such a case.

The factors relied on by the judge and our colleague do not establish, even circumstantially, that the Respondent knew of Cox's union activity. As to the first factor, it is neither logical nor reasonable to leap from a general knowledge of union activity to specific knowledge of Cox's union activity. There is no evidence that Cox engaged in open union activity at the Respondent's facility or that anyone who was aware of her offsite union activity reported that activity to the Respondent. Furthermore, there is no evidence that the Respondent knew that Cox was a member of the organizing committee.

As to the second factor, the Respondent has demonstrated antiunion animus. However, a general finding of animus does not by itself establish the element of knowledge required under *Wright Line* to establish a violation of Section 8(a)(3). As to the third factor relied on by our colleague—timing—we decline to infer knowledge solely on this basis. Although the discharge followed the listing of Cox on the June 10 invitation, there is no showing that the Respondent was aware of the invitation. As to the fourth factor, as shown below, we find that Cox was not treated disparately.

There is simply no proof that the Respondent knew of Cox's union activity, and, thus, the General Counsel has not met his threshold burden under *Wright Line*. "[C]redible proof of 'knowledge' is a necessary part of the General Counsel's threshold burden, and without it, the complaint cannot survive." *Tomatek, Inc*., 333 NLRB 1350, 1355 (2001). Further, even if the General Counsel had met his threshold burden, the Respondent has shown that it would have discharged Cox in any event for excessive absences during her probationary period.

Cox was serving a 6-month probationary period. She had completed a mere 2 months of this period, during which her absences constituted almost half of her scheduled worktime. In this regard, the Respondent asserts, without contradiction, that Cox was absent or late on 43 percent of her scheduled shifts during this 2-month period. The record shows that she had seven excused absences and six tardies/leaving early during this period.

During the week leading up to her discharge, Cox had three excused absences, and she left early 1 day, with permission. On June 5, Cox called Supervisor Steve Carlson to ask if she could leave work early the following day for a doctor's appointment. Carlson denied Cox's request, stating that a "run" (extra work) precluded Cox from taking a partial day off. Notwithstanding the denial, Cox did not report for work on June 6. She did visit the facility on June 6 to give Carlson a note from her doctor and to pick up her paycheck. On June 7, Cox left early, with permission, to tend to her sick son. She missed work on June 8 and 9, as her son was still sick. Sometime between June 9 and 13, the Respondent decided to discharge Cox because she had failed her probationary period.

There is nothing to show that the Respondent acquired knowledge of Cox's union activity between June 9 and 13.[14] Neither is there a showing that any other probationary employee had the same attendance problems as Cox. Our dissenting colleague lists other employees with poor attendance records who were not discharged. However, the record fails to establish that these employees were still in their probationary periods. "An essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated." *Thorgren Tool & Molding*, 312 NLRB 628 fn. 4 (1993). On this record, that "essential ingredient" is missing because the General Counsel has not shown the existence of "similar circumstances," i.e., that the "other employees" with poor attendance records were probationary

[13] Member Schaumber would refer to this as Sec. 7 animus. See *ATC/Forsythe & Associates*, 341 NLRB No. 66 fn. 5 (2004).

[14] Our dissenting colleague speculates that the Respondent discovered Cox's union activities by learning, through the Union's pizza party invitation, that she was on the organizing committee. However, the employees received that invitation at their homes the day before she was fired. We find it unreasonable to speculate that the employees informed the Respondent of Cox's status on the very night that the invitation was delivered, and that the Respondent made its decision to fire her based upon that information, that very night.

employees. Thus, we find unpersuasive our colleague's argument that Cox was treated disparately.[15]

In sum, the General Counsel has not shown that the Respondent knew of Cox's union activity. Even assuming such knowledge, the Respondent has shown that it would have discharged her for her poor attendance record during her probationary period. Thus, we reverse the judge's finding that the Respondent violated Section 8(a)(3) of the Act by discharging Cox.

VI. *GISSEL* BARGAINING ORDER

Based on this record, we find that a fair election can be held after the entry of traditional remedies and that the unlawful conduct engaged in by the Respondent—three violations of Section 8(a)(1)—does not warrant the imposition of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Under *Gissel*, supra, the Board will issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus, rendering a fair election impossible. 395 U.S. at 613–614. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine the majority strength and impede election processes." Id. at 614. The dissent relies solely on the second category. We find that this case does not fall into either of these categories.

In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations; the size of the unit; the extent of the dissemination among employees; and the identity and position of the individuals committing the unfair labor practices. *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001); *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), enfd. 48 F.3d 1360 (4th Cir.), cert. denied in pertinent part 516 U.S. 963 (1995). A *Gissel* bargaining order, however, is an extraordinary remedy. The preferred route is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies. *Hialeah Hospital*, 343 NLRB No. 52, slip op. at 5 (2004), citing *Aqua Cool*, 332 NLRB 95, 97 (2000).

The instant case is similar to *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339 (2000), in which the Board found that a *Gissel* bargaining order was not warranted. In *Yoshi's*, as in this case, the respondent committed several violations of the Act during a union organizing campaign. The respondent solicited grievances, promised to remedy them, granted wage increases, interrogated employees, and threatened plant closure if the union was selected. Notwithstanding these violations, the Board found that it had not been shown that traditional remedies would be inadequate.

Likewise, we have declined to impose *Gissel* bargaining orders in cases in which the violations committed were of greater severity than the violations committed here. For instance, in *Hialeah Hospital*, supra, we declined to impose a *Gissel* bargaining order against an employer that committed a retaliatory discharge and many 8(a)(1) violations, including threats, surveillance, promise of benefits, and removal of benefits. In *Desert Aggregates*, 340 NLRB No. 38 (2003), no bargaining obligation was imposed against an employer that unlawfully solicited and promised to remedy employee grievances and laid off two leading union supporters. In *Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117 (2004), we refused to impose a *Gissel* bargaining order against an employer that, among other things, granted a unit-wide wage increase, discharged a leading union activist the day before the election, made threats of plant closure, and engaged in surveillance. Similarly, we find here that a *Gissel* bargaining order is not necessary.

It is true, as our colleague contends, that unit employees continue to benefit from the Respondent's unlawful grant of the wage increase. We think it sufficient to order the Respondent to withdraw the increase if that is what the Union wants, or, if the Union wants to keep the increase, to order the Respondent to cease such conduct and to apprise employees of this remedy. In sum, we find that a bargaining order is unwarranted and that traditional remedies will suffice to ensure a fair election and erase the effects of the Respondent's unfair labor practices.[16]

Finally, because we have decided not to issue a bargaining order in this case, we also reverse the judge's findings that the Respondent violated Section 8(a)(5) and

[15] Our colleague cites *Mays Electric Co.*, 343 NLRB No. 20 (2004), in support of her claim that the Respondent failed to establish it would have discharged Cox absent her union activity. In *Mays Electric*, supra, the Board found that the employer failed to prove that it had any consistent policy of discharging employees with attendance records similar to that of the discriminatee. Here, however, as we have already noted, the record fails to establish that other employees who had poor attendance records were probationary employees as was Cox.

[16] The Charging Party has requested, inter alia, that the Respondent's publisher be required to personally read the Board notice to employees and that the Respondent be required to publish the notice in its newspaper. The Charging Party also seeks reimbursement for its litigation expenses. We find that the Charging Party has not shown a basis for imposing these special remedies here.

(1) of the Act by refusing to bargain with the Union and by refusing to provide the Union with requested relevant information.[17]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, The Guard Publishing Company, d/b/a The Register Guard, Eugene, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Providing increased benefits to employees to encourage them to refrain from supporting and/or assisting Teamsters Local Union No. 206, affiliated with the International Brotherhood of Teamsters, AFL–CIO, or any other labor organization.

(b) Soliciting complaints and grievances and thereby implying that the Respondent will provide improved benefits to employees if they refrain from supporting and/or assisting the Union.

(c) Soliciting employees to withdraw their signatures from the Union's petition, and, therefore, withdraw their support from the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Eugene, Oregon, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2000.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 28, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Respectfully, I differ with the majority on three issues: whether the Respondent unlawfully created the impression of surveillance, whether it unlawfully discharged employee Kama Cox, and whether a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is appropriate to remedy all of the Respondent's unfair labor practices. Because I would sustain the judge's decision on each of these issues, I dissent.

I. CREATING THE IMPRESSION OF SURVEILLANCE

As the majority correctly finds, Publisher and Editor Tony Baker, the Respondent's highest ranking official, sent a June 7, 2000[1] letter to employees that violated Section 8(a)(1) of the Act by soliciting employees' grievances and promising to remedy them. In this same letter, the Respondent stated: "I am encouraged that some employees have already requested that their union signature cards be withdrawn." The judge correctly found that by this statement the Respondent unlawfully created the impression of surveillance.

The Board does not require that an employer's words to an employee reveal on their face that the employer acquired its knowledge of the employee's activities by unlawful means. See *United Charter Service*, 306 NLRB 150, 151 (1992). Rather, an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. See *Emerson Electric Co.*, 287 NLRB 1065, 1065 (1988). "The idea behind finding 'an impression of sur-

[17] In light of our decision, it is unnecessary to pass on the Respondent's arguments that the Union did not enjoy the support of a majority of unit employees, that the composition of the unit has changed, and that the passage of time and changed circumstances have nullified any "lingering effects" of any alleged unfair labor practices.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates hereafter are 2000, unless otherwise indicated.

veillance' as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257, 257 (1993).

When Baker revealed in his June 7 letter that he knew that some employees had requested that their union authorization cards be withdrawn, an employee reasonably would conclude, on reading the letter, that someone in management acquired this information through monitoring or eavesdropping on private conversations between employees, or through questioning of employees. Nothing in the letter suggests that this information, which normally would have been communicated between employees in private conversations, was a matter of public knowledge.[2] Accordingly, I would affirm the judge's finding of a violation.

II. DISCHARGE OF KAMA COX

In analyzing Cox's discharge pursuant to *Wright Line*,[3] the majority does not dispute that the General Counsel has established that Cox was engaged in union activity and that the Respondent demonstrated antiunion animus. However, my colleagues find no proof that the Respondent knew of Cox's union activity and that, even if there was such proof, the Respondent has met its *Wright Line* rebuttal burden. I disagree. There is compelling circumstantial evidence that the Respondent knew Cox was engaging in union activities. Further, in my view, the Respondent has failed to establish that it would have discharged Cox absent those activities. Therefore, I would find that it discharged her because of those activities, in violation of Section 8(a)(3) and (1) of the Act.

Cox initially worked for the Respondent on the night shift from September 21, 1999, to January 19, 2000. During this time, she was a single mother attending school and had attendance problems. She was never warned or disciplined for these problems. When working the night shift became too difficult, she voluntarily resigned. She reapplied in April, was immediately rehired, and began work on April 6. No mention of her prior attendance problems was made.

Cox attended the Union's first meeting on May 30. She signed the Union's petition and volunteered to be on the Union's organizing committee.

On June 3, Cox called in sick with a severe allergy/asthma attack. On Monday, June 5, she called Supervisor Steve Carlson and told him that she could not get a doctor's appointment until 2 p.m. the following day and would need to leave work early that day. Carlson told Cox that she either had to work the entire day or take the entire day off because they had a "run" that day, meaning an extra load of work. Cox replied that they never had runs on Tuesdays and that there was no run on the schedule. When Carlson insisted, Cox said she needed to see the doctor and would take the whole day off. On June 6, Cox called the Respondent's human resources department and complained to Supervisor Jerry LaCamp about Carlson's denying her permission to leave work early for a doctor's appointment. LaCamp told Cox to talk with Distribution Manager Tom Strub when he returned from vacation the following week. Later that day, Cox went to the Respondent's facility to give Carlson a doctor's note and to pick up her paycheck. While there, Cox discovered that, contrary to Carlson's assertion, there had been no run that day.

The following day, June 7, Cox was called by her son's daycare provider and informed that he was ill. She obtained permission to leave work early to get him, and for the next 2 days, Cox telephoned Carlson that her son was still sick and that she would not be coming to work. Carlson told her that she could come in on her next scheduled workday, Tuesday, June 13.

Meanwhile, on June 10, the Union had mailed invitations to all unit employees for a pizza party to be held on June 14 at the union hall. The invitation listed the names of the five organizing committee members, including Kama Cox. The invitations were delivered to employees' homes on June 12.

When Cox returned to work on June 13, she was met in the parking lot by Supervisors Strub and Carlson. Cox started to hand Strub the doctor's excuse for her son's illness, but he refused to accept it. Cox was then told that she was discharged for failing her probationary period.

On this record, the judge found that the Respondent unlawfully discharged Cox because of her union activities. The Respondent argues, and my colleagues agree, that the Respondent did not know that Cox was engaged in union activity. I disagree.

[2] The majority asserts that Baker made it clear in his June 16 letter that the source of his knowledge was reports by some employees to their supervisors. Such later disclosure is immaterial: employees had already been chilled in the exercise of their Sec. 7 rights by the statement in the June 7 letter.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

It is true that there is no direct evidence of such knowledge. However, it is well settled that a reasonable inference of such knowledge may be drawn from circumstantial evidence. See *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046, 1049 (1985); *BMD Sportswear Corp.*, 283 NLRB 142 (1987), enfd. mem. 847 F.2d 835 (2d Cir. 1988). The Board has inferred knowledge based on such circumstantial evidence as: (1) a respondent's general knowledge of its employees' union activities; (2) the respondent's antiunion animus; (3) the timing of the allegedly discriminatory action; and (4) disparate treatment. See *Greco & Haines, Inc*., 306 NLRB 634 (1992).

Applying these criteria here, I would find, as did the judge, compelling circumstantial evidence that warrants an inference that the Respondent knew that Cox was engaging in union activities and that it discharged her because of those activities.

First, the evidence clearly establishes that the Respondent knew generally of the Union's organizing efforts. This knowledge is evidenced by Baker's May 31 letter that states: "It has been brought to my attention that a few employees have been talking about representation by a union."

Second, there is ample evidence of the Respondent's union animus. The Respondent unlawfully granted a wage increase; unlawfully solicited employees' grievances and remedied them; and unlawfully solicited employees to withdraw their union authorizations. As the judge found, the Respondent acted to thwart the organizing efforts of its employees immediately upon learning of such efforts.

Third, the timing of Cox's discharge provides very strong evidence to infer that the Respondent knew of Cox's support of the Union. Her discharge occurred within 2 weeks after she volunteered to be on the union organizing committee, and 1 day after invitations to a union pizza party that stated that Cox was a member of the Union's organizing committee were delivered to employees.[4] Cox was fired when she arrived for work the following day.

Lastly, knowledge of Cox's union activity is established by evidence of disparate treatment. Cox had no unexcused absences, seven excused absences, and six tardies/leaving early in 2 months. However, the record shows numerous other employees with similar or worse absentee problems. Adam McCabe had three unexcused absences, five excused absences, and two tardies/leaving early in 6 months; Wendy Sprenger had 4 unexcused absences, 10 excused absences, and 2 tardies/ leaving early in 8 months; Heather Stewart had two unexcused absences, four excused absences, and three tardies/leaving early in 4 months; and Johny Susanto had 6 unexcused absences, 11 excused absences, and 3 tardies/leaving early in 4 months. These employees were still employed by the Respondent at the time of the hearing, and the Respondent offered no explanation for why Cox, who had no unexcused absences, was treated differently.[5]

Accordingly, for all of the foregoing reasons, I conclude, contrary to the majority, that the General Counsel has satisfied his initial *Wright Line* burden of proving that the Respondent knew of Cox's union activities and that her discharge was unlawfully motivated. I would also find that the Respondent failed to meet its rebuttal burden of establishing that it would have discharged Cox regardless of those activities.

The Respondent had no policy mandating discipline or discharge after a certain number of absences. As detailed above, other employees with similar numbers of absences were not discharged. Further, it is significant that Cox was immediately rehired in April despite a history of absences while serving a probationary period during her first term of employment and without any mention of such history. At that time, when she had not engaged in any union activity, her absences apparently were of no concern to the Respondent. There is also no evidence that Cox was ever counseled about her absences after she returned to work for the Respondent. However, within 2 weeks of engaging in union activity, and 1 day after all employees were advised that Cox was on the Union's organizing committee, the Respondent suddenly found that her absences warranted her discharge. Even acknowledging that Cox's attendance record was poor, I would find that the Respondent has not established that it would have discharged her for this reason absent her union activity.[6] Thus, I would affirm the judge's finding

[4] The majority claims it is speculation to assert that the Respondent learned of Cox's union involvement through her name appearing on the Union's pizza party invitation that was delivered to employees the day before she was fired. As detailed above, various factors warrant the inference that the Respondent knew of Cox's union activities. The timing of the discharge, 1 day after the invitations were delivered, is but one of these factors.

[5] The majority argues that the record does not show that the other employees with poor attendance records were probationary employees like Cox. However, the record also does not show that the attendance standards the Respondent applied to probationary employees were different from the ones applied to nonprobationary employees. In fact, at the hearing, the Respondent offered no witnesses to explain why Cox was treated more harshly than the other employees with worse attendance records or otherwise explain the reasoning and timing for her discharge. Therefore, on this record, the General Counsel has established a prima facie case of disparate treatment, and the Respondent has not rebutted it.

[6] See *Mays Electric Co.*, 343 NLRB No. 20 (2004) (employer unlawfully discharged employee who had spotty attendance record,

that the Respondent discharged Cox in violation of Section 8(a)(3) of the Act.

III. *GISSEL* BARGAINING ORDER

The nature and extent of the Respondent's unfair labor practices warrant the imposition of an affirmative bargaining order. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). As the majority finds, the Respondent unlawfully granted a unit-wide wage increase; solicited employee grievances and promised to remedy them; and solicited employees to withdraw their union authorizations. In my view, the Respondent also unlawfully created the impression of surveillance and unlawfully discharged a leading union activist. The wage increase and the discharge are "hallmark" violations of the Act, which will normally support the issuance of a bargaining order. See *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980) (grant of benefits and discharge of union adherent considered "hallmark" violations); *Scott v. Stephen Dunn & Associates*, 241 F.3d 652, 666 (9th Cir. 2001) (wage increase designed to impact the outcome of a representation election is "hallmark" violation and is as "highly coercive" in its effect as discharges or threats of business failure).

Further, the severity of the Respondent's unlawful conduct is exacerbated by the involvement of its high-ranking official. Here, Tony Baker, the Respondent's editor and publisher, participated in each of the unfair labor practices committed. He conducted the June 1 meeting at which he solicited grievances and promised to remedy them, and at which the wage increase was announced. He wrote the letters that unlawfully solicited employees to revoke their union authorizations and that unlawfully created the impression that employees' union activities were under surveillance, and he authorized the discharge of Cox, a leading union activist. "When the anti-union message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten." *Consec Security*, 325 NLRB 453, 455 (1998), enfd. mem. 185 F.3d 862 (3d Cir. 1999).

It is also significant that most of the unfair labor practices committed by the Respondent affected the entire bargaining unit. The wage increase was granted to all employees. Likewise, the Respondent's letters that solicited employees to withdraw their union authorizations and that created the impression of surveillance were sent to all employees, and the Respondent solicited employee grievances at a meeting for the entire bargaining unit. It is well settled that where a substantial percentage of employees in the bargaining unit are directly affected by an employer's serious unfair labor practices, the possibility of holding a fair election decreases. *Cogburn Healthcare Center*, 335 NLRB 1397, 1399 (2001); *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 233 (6th Cir. 2000), enfg. 328 NLRB 1114, 1115 (1999) (serious unfair labor practices directly affected entire bargaining unit).

The Board's traditional remedies cannot eradicate the impact of the Respondent's unlawful conduct. "Unlawfully granted benefits have a particularly long-lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees." *Parts Depot, Inc.*, 332 NLRB 670, 675 (2000). Wage increases thus serve as a constant reminder of the Respondent's use of economic weapons to defeat the Union. As the Board has declared, "[i]t is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed." *Tower Records*, 182 NLRB 382, 387 (1970), enfd. 1972 WL 3016 (9th Cir. 1972).

For these reasons and for the reasons discussed by the judge, it is unlikely that the effects of the Respondent's unlawful conduct can be erased by the use of traditional remedies and that a fair election could be held. *Gissel*, supra, 395 U.S. at 614–615.[7] Accordingly, I would adopt the judge's recommendation to issue a remedial bargaining order. I would similarly adopt the judge's findings that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union and by failing to provide requested relevant information.

Dated, Washington, D.C. July 28, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

where employer failed to prove that it had consistent policy of discharging employees with attendance records similar to that of employee).

[7] The majority finds this case similar to *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339 (2000). Because I would find that the Respondent here engaged in a "hallmark" violation when it discharged Cox, *Yoshi's* is distinguishable.

The majority cites *Hialeah Hospital*, 343 NLRB No. 52 (2004); *Desert Aggregates*, 340 NLRB No. 38 (2003); and *Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117 (2004), as cases in which the Board declined to impose *Gissel* bargaining orders. I dissented from the Board's failure to impose *Gissel* bargaining orders in *Hialeah Hospital* and *Desert Aggregates*. I did not participate in *Jewish Home*, but I agree with the dissent in that case that a *Gissel* order should have been imposed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT provide increased benefits to employees to encourage them to refrain from supporting and/or assisting Teamsters Local No. 206, affiliated with the International Brotherhood of Teamsters, AFL–CIO, or any other labor organization.

WE WILL NOT solicit complaints and grievances from our employees and thereby imply that we will provide improved benefits to employees if they refrain from supporting and/or assisting the Union.

WE WILL NOT solicit employees to withdraw their signatures from the Union's petition, and, therefore, withdraw their support from the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

THE GUARD PUBLISHING COMPANY, D/B/A THE REGISTER GUARD

Linda J. Scheldrup, Esq., for the General Counsel.
William H. Bruckner, Esq. and Glen Plosa, Esq., for the Respondent.
David A. Rosenfeld, Esq. and *Stefan Ostrach,* for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

[1] This case was heard at Eugene, Oregon, on December 4–6, 2000. All dates herein refer to the year 2000, unless otherwise stated.

[2] 29 U.S.C. § 158 (a)(1), (3), and (5).

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent, an Oregon corporation, is engaged in the business of publishing newspapers. The Respondent operates a facility in Eugene, Oregon, and employs approximately 400 persons at this location. Most of the Respondent's Eugene employees are represented by unions but the distribution department employees are not.

The Respondent admits, and I find, that the following individuals were its supervisors and agents at the times relevant to this case: Alton F. (Tony) Baker III, editor and publisher; R. Fletcher Little, general manager; Cynthia Walden, human resources director; Thomas Strub, distribution department manager; Steve Carlson, supervisor; and Jerry LaCamp, supervisor.

III. APPROPRIATE UNIT

The Government's complaint alleges that the following unit is appropriate for collective-bargaining purposes within the definition of Section 9(b) of the Act:

> All distribution employees employed by the Employer at its Eugene, Oregon location; excluding office clerical employees, transportation helpers, bundle haulers, professional employees, guards and supervisors as defined in the Act.

The Board conducted a stipulated election in this unit in 1995. The Respondent signed that stipulation. The record supports the conclusion that the distribution employees have continued since 1995 to perform the same work under basically the same supervision. They are a distinct work group within the Eugene facility. Distribution employees occupy job classifications of technical support employees, core employees, and additional employees. Their work relates to counting, putting inserts in the newspapers, bundling, and stacking. The papers are then forwarded to transportation helpers whose job it is to see that the newspapers are placed on the trucks of independent contractors for distribution. Transportation helpers work in the circulation department that is represented by a different union. The Respondent's other production employees are also represented by other labor organizations.

The Respondent denies the appropriateness of the distribution department unit but does not specify its objections to the unit. The Respondent does not urge that any other unit is the appropriate unit. I find, based on the record as a whole, that the described distribution department unit is an appropriate unit for purposes of collective bargaining under the Act. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986).

IV. MAJORITY STATUS

The Respondent argues that the Union was never legitimately authorized by a majority of the distribution department employees to be their collective-bargaining representative. As of June 1, 2000, there were 60 employees in the distribution

unit. The Government asserts that the Union obtained majority support by June 1 because on that date 41 of the 60 unit employees had signed petitions authorizing the Union to bargain for them.

In May 2000, some of the distribution employees contacted the Union about obtaining union representation. Approximately 25 of these employees met with Union Representative Stephan Ostrach on May 30. Ostrach told the employees that his organization had sought to represent the distribution employees in 1995 but had ultimately lost a Board-conducted representation election. Ostrach emphasized to the employees that in order to consider proceeding with another organizational effort the Union would need 70 percent of the distribution employees to sign authorization petitions.

Ostrach told the employees to sign the petitions if they wanted the Union to represent them. The following 24 employees signed petitions at the union meeting: Troy Amburn, Bradley E. Barnhart, Marcus Bladow, Clarence Copple, Kama Cox, Michael R. Dorman, Tom Dorman, Jason Fairchild, Manuelito Go, Shawn Hand, Stephen Kucera, Andy Kumler, Jeff Kumler, June Kundert, Adam McCabe, Shari Millican, Fernandita Nichols, Jason Picraux, Mike Primrose, Blake C. Schwab, Miguel C. Singson, George Szuatsek, Shiella May Troyo, and Robert Warner. I find that the signatures of these 24 employees were properly authenticated and shall be counted in determining the Union's majority status.

The petitions were then taken to work by some of the employees to obtain additional signatures from fellow workers. The Respondent's brief argues that some of the employees who subsequently signed the petitions did so, "believing that they were only authorizing a vote on whether to be represented by the Teamsters because of the representations made by the persons who solicited their signatures." The Respondent's brief is limited as to specifics in support of that argument, but does state, "Union adherents repeatedly told employees that the signing of the petition was just to get a vote. In fact, Marcus Bladow testified that he told employees to ignore the language on the petition." The Government asserts that the subsequent petition signers were not misled by statements of solicitors and that the signers are bound by the printed language at the top of the petitions.

The petitions the distribution employees signed are headed with the following language:

> The undersigned hereby authorize the International Brotherhood of Teamsters, Local Union No. 206 as their representative to bargain collectively with their employer on their behalf and to negotiate agreements concerning wages, hours, and all other conditions of employment.

The Board has previously held, with court approval, that such petitions are unambiguous, single-purpose authorization petitions. *Ona Corp. v. NLRB*, 729 F.2d 713, 723-724 (11th Cir. 1984).

In *NLRB v. Gissel Packaging Co.*, 395 U.S. 575, 606–607 (1969), the Supreme Court stated the following regarding union authorizations:

> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. . . .

The Board set forth its views on the same subject in *DTR Industries*, 311 NLRB 833 (1993):

> Thus, where the card on its face clearly declares a purpose to designate the union as collective-bargaining representative, the only basis for denying face value to the authorization card is affirmative proof of misrepresentation or coercion. *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968). In *Levi Strauss*, the Board explained and reaffirmed the *Cumberland Shoe* doctrine (144 NLRB 1268 (1963), enf. 351 F.2d 917 (6th Cir. 1965)) in the context of unambiguous, single-purpose authorization cards. The Board stated:
>
> > Declarations to employees that authorization cards are desired to gain an election do not under ordinary circumstances constitute misrepresentations either of fact or of purpose. As in the instant case, where the Union did use the evidence of employee support reflected by the cards to get an election, such declarations normally constitute no more than truthful statements of a concurrent purpose for which the cards are sought. That purpose, moreover, is one that is entirely consistent with the authorization purpose expressed in the cards, as well as with the use of the cards to establish majority support. A point sometimes overlooked is that in basic purpose there is no essential difference between cards that are needed for a showing of interest to gain an election and cards that must be used to support a majority designation showing in a Section 8(a)(5) complaint proceeding. . . .

Regarding the challenged authorizations in the present case, the record shows that subsequent to the May 30 union meeting employee Shiella Troyo solicited fellow workers James Gray, Chris Munoz, Abe Huerta-Guzman, Sam Plesner, Dan Plesner, and Amber Plant, to sign the Union's representation petitions.[3] Troyo witnessed them all sign the petition. Troyo testified that she told the employees, "[I]f you sign the petition, that you are saying . . . that you would like the Union to represent you, also added as a vote to get a union into the building." Troyo testified that she never told anyone that she solicited to ignore the written heading on the petition.

James Gray testified that Troyo did not tell him signing had anything to do with getting a vote, but rather, "She said we had to get everything filled out before we could see how many people would go for a union there." Gray's testimony also authenticated his own signature on the petition. I find that Gray's

[3] The Government's brief notes that Anastasia (Annie) Wilcox also signed the petition, but on June 2. The Government states that it, thus, does not rely on her signature as part of its proof of the Union's June 1 majority status.

signature shall be counted in determining the Union's majority status.

Munoz and Guzman did not testify and no evidence was presented to attack the authenticity of their signatures. The signatures of Guzman and Munoz were placed on the petition between signatures dated May 30 and June 1. I find that they signed the petition no later than June 1. As discussed in detail below, on June 1 the Respondent announced raises for unit employees. Thereafter, Munoz and Guzman requested that their names be removed from the petition. Based on my findings set forth infra, that the raise announcement is an unfair labor practice, I find that the revocations of the signatures of Munoz and Guzman were ineffective in eliminating their being counted for determining the Union's majority status. *Dlubak Corp.*, 307 NLRB 1138, 1138 fn. 2 (1992), enfd. Mem. 5 F.3d 1488 (3d Cir. 1993). Considering Troyo's unrebutted testimony regarding their signing of the petitions, I find that the signatures of Munoz and Guzman shall be counted in determining the Union's majority status.

Dan Plesner testified Troyo told him, "[I]t's a petition to get enough signatures to get—to have a vote. You know what I mean? It wasn't a vote. It was a petition to get enough people to vote. Supposedly we had to have two-thirds of that department in order for us to get a chance to vote." When asked about the two-thirds, he responded, "[W]ho wanted the union or who was interested in the union." I find that, even crediting Dan Plesner's version of what was said to him, he was not told, either explicitly or in substance, that the petition would be used only or solely for an election or vote. I find that Dan Plesner's signature shall be counted in assessing the Union's majority status. *NLRB v. Anchorage Times*, 637 F.2d 1359, 1368–1369 (9th Cir. 1981).

Sam Plesner testified Troyo asked him, "Do you want to sign so we can get a vote for the union, basically." Sam Plesner's demeanor and testimony demonstrated his confusion as to the purpose of the petition. Considering the credited testimony of Troyo as to what she told persons that she solicited for signatures, and Sam Plesner's testimony which did not state that he was told the only purpose of the petition was to secure a vote, I find that his signature shall be counted in determining the Union's majority status.

Amber Plant testified that she supported the Union and read the heading at the time she signed the petition. She also testified that there was a discussion about getting a vote at the same time. It is clear that Plant supported the Union when she signed and that nothing was told to her that would invalidate the language that stated the purpose of the petition. I find that Plant's signature shall be counted in determining the Union's majority status.

David Meeks testified that employee Marcus Bladow solicited him to sign the petition. Meeks read the petition before he signed and recalled being told by Bladow that he should sign if he was interested in bringing in the Union. I find that Meeks' signature shall be counted in determining the Union's majority status.

Brian Adkisson testified that he was not asked to sign the petition, but, "I signed it." He further testified that he could not remember if he read the petition before signing. Adkisson recalled discussing the petition with employee Bradley Barnhart who had presented it to him. He remembered Bradley saying the petition was for a vote for the Teamsters Union. I find Adkisson was not told that his signature was for a purpose contrary to the stated purpose of the petition. I find his signature shall be counted in determining the Union's majority status. It is noted that Adkisson subsequently asked that his signature be removed from the petition after he received a wage increase from the Respondent.

Daniel Black authenticated his signature on the petition. He testified that he supported the Union at the time he signed and that he was told that the purpose of the petition was "to bring forth some sort of election or something to decide if the distribution crew was going to have a union or not." I find that Black's signature shall be counted in determining the Union's majority status.

John (Richie) Carr authenticated his signature on the petition. He testified that he read it when he signed, and that he was told the petition was "supposed to be signed to see if we could vote for—see if the union will represent us." I find that Carr's signature is valid and shall be counted in determining the Union's majority status.

Cecilia Winzer testified that she signed the petition after being told, "they said that they were trying to get signatures to see if there was enough people for the Union." I find that Winzer's signature shall be counted in determining the Union's majority status.

Andy Kumler was originally a supporter of the Union. He subsequently was given a $2.20 per raise by the Respondent. He thereafter asked that his name be removed from the petition. Kumler testified that he solicited signatures from several employees. All but one of the employees in question that he solicited (Cecilia Winzer, John Richie Carr, and Brian Adkisson) authenticated their own signatures. The exception is Wendy Sprenger who did not testify at trial. I have already found the signatures of Winzer, Carr, and Adkisson are valid. Kumler testified at one point that he told employees that signing the petition was "only to get a vote." In contrast, on direct examination he testified, "I told them that it was a petition to have a vote—if we had enough signatures, then to show the union that there was enough interest and we would have a vote to have them be our collective bargaining [representative]." He did not specifically testify as to what, if anything he told Sprenger when she signed the petition in his presence. I found Kumler to be a vacillating and unsure witness. Based upon his admission that he told employees that the purpose of the petition was to "show the union that there was enough interest" and "have them be our collective bargaining" representative, I find that the Respondent has failed to carry its burden of demonstrating that Sprenger's signature should be invalidated. *Photo Drive Up*, 267 NLRB 329, 364 (1983) ("It is the Respondent who must show clear and convincing evidence of material misrepresentations to invalidate otherwise unambiguous authorization cards."); *Waste Management of Utah, Inc.*, 310 NLRB 907, 910 fn. 128 (1993); *NLRB v. Gissel Packaging Co.*, 395 U.S. 575, 584 (1969) (Authorization signatures will be counted, "unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election. . . . [Em-

phasis in original.]) I find that Sprenger's signature shall be counted in determining the Union's majority status.

Marcus Bladow solicited the signatures of Adam Bacon, Mike Crow II, Mathew Pearson, Nathan Ramirez, and Jennifer Stephenson. Bladow testified that he had a general statement he made to some persons he solicited to sign the petition. He recalled saying, "[T]his is to organize a vote for the Register-Guard to see if we want a union." Bladow recalled some employees simply signed the petition without him having to say anything. Other, unspecified persons, questioned him about signing because they read the petition to mean that signing was an affirmation they wanted the Union. Bladow testified he would tell these persons, "No, this is not a vote. This was to bring in the vote. . . . We have to have so many signatures even to get the vote." The authenticity of the signatures of the above-named persons that Bladow talked to are not questioned. The Respondent presented no evidence that any of these individuals were the persons with whom Bladow discussed an election. Nor does the record as a whole reflect that Bladow's statements concerning an election overrode the clear language in the heading of the petition. In sum, I find that the Respondent did not meet its burden of showing by clear and convincing evidence that the signatures of Bacon, Crow, Pearson, Ramirez, and Stephenson should not be counted in determining the majority status of the Union. *Photo Drive Up*, supra. I find, therefore, that their signatures shall be counted for such purposes.

In summary, I find that on June 1, 2000, the Union had obtained 41 valid signatures on the authorization petitions from Respondent's 60 distribution center employees. The authorization petitions contained the above-quoted unambiguous representation language. I find, therefore, that the Union was the majority representative of the unit employees as of June 1, 2000.

V. WAGE INCREASES AND OTHER ALLEGED UNFAIR LABOR PRACTICES

A. Background Regarding Wage Increases

Employee Andy Kumler testified that in April 2000 he asked Distribution Center Manager Tom Strub about possible wage increases. Strub told him that wage increases were "in the workings" and he would pass along the employees' wage concerns to Supervisor Jerry LaCamp. Employee Bradley E. Barnhart testified that he had met with Human Resources Manager Cynthia Walden and LaCamp, approximately the middle of the week prior to the May 30 union meeting. Barnhart described how he had complained to Walden and LaCamp that the distribution employees had not yet received a wage increase. Walden told him that the Respondent was still conducting a survey and comparing wages with other companies. As noted above, starting on May 30 the employees began signing union authorization petitions.

B. Respondent's May 31 Letter

On May 31, Tony Baker, Respondent's editor and publisher addressed a letter to all of the unit employees. The letter stated that Baker had learned that a few employees had been talking about union representation and the Respondent:

> . . . will oppose, by all lawful means, the organization of our Distribution Center employees by a labor union. . . .
>
> . . . .
>
> You voted down union representation a few years ago and I sincerely hope that we do not have any election this year.
>
> . . . .
>
> If you have made a mistake by signing a [union authorization] card you have the right to ask for the card back or to withdraw your signature. If you have not signed anything I urge you not do so.
>
> Its also come to my attention that Guild officers (a union representing another unit of Respondent's employees) and retirees are encouraging you. Be smart. The Guild contract has expired and those employees have had no pay raise for two years. Don't let yourself be "used."
>
> I thought it would be helpful for you to know my feelings on this issue.

C. Respondent's June 1 Employee Meeting

On June 1, the Respondent held a meeting with the distribution employees. Tony Baker conducted the meeting and General Manager R. Fletcher Little, Jerry LaCamp, and Cynthia Walden were also present. The Respondent has historically held meetings with the distribution department employees at irregular intervals.

Barnhart testified about the events preceding the meeting and what occurred during the meeting. I found Barnhart to be a witness who accurately described what he observed without embellishment. His demeanor was persuasive and I credit his testimony regarding what took place during the June 1 employee meeting. Other employees also testified to what happened during the meeting. Their testimony was generally consistent with Barnhart's description of the event. To the extent that their testimony conflicts with Barnhart, I credit Barnhart's testimony of what took place. None of the Respondent's supervisors testified at the hearing.

Barnhart recalled he first learned of the meeting when he was at work on May 31. He asked Supervisors Dirk Winters, Clayton Johnson, and Rex Loy what the meeting was about. They all responded that it may have something to do with the union effort.

Barnhart testified that the June 1 meeting commenced with Walden discussing overhead projections that outlined wage increases over a 5-year period in the distribution department. Another transparency contrasted the wage increases of the distribution department with the other departments in the plant that are represented by unions. The Government subpoenaed all such overhead transparencies. The Respondent produced only one, stating it was the single item that could be located. That transparency showed the raises the distribution employees had received effective January 31, 1999. (GC Exh. 14.) Walden announced to the employees that they were going to be receiving wage increases effective June 11.

The Respondent's history of granting wage increases to distribution center employees and the raises announced on June 1, 2000, are set forth in the following table:

	CREW MEMBER				TECHNICIAN			
DATE EFFECTIVE	**BEG. SCALE**	**% CHANGE**	**TOP SCALE**	**% CHANGE**	**BEG. SCALE**	**% CHANGE**	**TOP SCALE**	**% CHANGE**
3/20/94	$6.20		$8.15		$7.10		$9.35	
3/19/95	6.45	4.03%	8.40	3.07%	8.16	14.93%	10.75	14.97%
1/14/96	7.00	8.53%	10.90	29.76%	9.53	16.79%	13.40	24.65%
NO RAISE IN 1997								
2/8/98	7.30	4.29%	11.25	4.81%	9.90	3.88%	13.90	3.73%
1/31/99	7.50	2.74%	11.55	2.67%	10.20	3.03%	14.30	2.88%
6/11/00 *	**7.95**	**6.00%**	**12.55**	**8.66%**	**12.90**	**26.47%**	**15.65**	**9.44%**
6/11/00 WITH NIGHT PAY	**$8.20**	**9.33%**	**$12.80**	**10.82%**	**$13.15**	**28.92%**	**$15.90**	**11.18%**

- Plus $.25 per hour night pay shift differential (Approximately 55 of the 60 unit employees work on the night shift.)

Barnhart asked why in previous years the raises had been granted in January and February, but when the employees started talking about union representation they received a raise in June. Walden answered that it took a long time to do the wage survey.

The Respondent's human resources administrative assistant, Vickie LeBlanc, testified regarding the wage increases. In sum, she related that the wage survey was delayed in 2000 because the human resources department was occupied with other matters (another bargaining unit's retirement issues, open enrollment of a medical plan, a workers compensation case, and FLSA litigation). The Respondent offered no evidence about the details of a wage survey or the timing and the amount of the raises given distribution center employees.

After Walden discussed the raises Baker talked with the employees about concerns they had. No agent of the Respondent testified about what was said at the June 1 meeting. The employees' testimony shows that the Respondent did not promise to solve the issues raised, Baker did, however, state that he would look into the concerns expressed.

Employees had questions concerning the need for drug testing, "additional" employees (limited-hours employees) getting more hours of work than full-time employees, and the issue of training. Barnhart explained that training was a concern of employees because the more training a person received the higher his wage level. The issue of getting more "core" positions was also raised (core employees receive company benefits). Another employee asked why the employees at this meeting were being served pizza and sodas, since the last time that had happened was when the employees had been engaged in union activity. The record reflects that employees had received refreshments at other employee meetings.

D. Baker's June 7 Letter

On June 7 Baker sent another letter to the distribution employees in which he noted that employees had raised several issues at the June 1 meeting. Baker's letter particularly mentioned the issues of training and core positions and states that Distribution Manager Tom Strub would be looking into those concerns. Baker's letter again emphasized his position on union organization: "I want to reiterate that I believe a union in the distribution center is not in your best interest or in the Company's best interest. Creating a union between you and the management of this Company will not assure you of any more or any faster response to your concerns." The letter concludes by noting that a suggestion form is enclosed and invites the employees to submit their "thoughts" and "concerns" to the Respondent.

About a week after the June 1 meeting the Respondent met with employees to discuss employee concerns. Barnhart testified that he met with Supervisors Tom Strub and Jerry LaCamp who discussed with him the possibility of creating additional core positions for employees. Shortly after the June 1 meeting the Respondent created two additional technical support positions. Two core employees were promoted to fill these positions, which in turn opened those positions to two additional employees.

E. Baker's June 16 Letter

Baker sent another letter to the distribution unit employees on June 16. In this communication Baker states that he has learned that some employees have told supervisors they were having problems getting their names removed from the union authorization petition. Baker advised them of their right to have their names removed. He also states that the Respondent's agents were not going to pressure the employees to withdraw their signatures. He did enclose a form letter which employees could use to revoke their authorizations.

F. Analysis of Wage Increases

The Supreme Court has interpreted Section 8(a)(1) of the Act to prohibit "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Court also stated that the "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove," and "[e]mployees are not likely to miss the inference that the source of benefits now is also the source from which future benefits must flow and which may dry up if it is not obliged." Accord, *NLRB v. Anchorage Times*, 637 F.2d 1359, 1367–1368 (9th Cir. 1981).

In *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1091 (1984), the administrative law judge, with Board approval, set forth the

presumptions regarding wage increases during the pendency of an organizing drive:

> Thus, an employer's grant of benefits during the course of union activity has a substantial potential for impacting upon and interfering with such activity. An employer's course in granting benefits in such situations must be charted to avoid the perception that the grant of benefits is responsive to union activity. Because of the obvious impact on employees of the grant of a benefit during a union election campaign, the granting of such benefits raises a strong presumption of illegality. More specifically, the presumption is that the employer's motive in granting the benefit is to influence employee choice in union representation. In view of this presumption, the burden is that of the employer to show that the grant of the increase was unresponsive to the organizational activity.

The Respondent's May 31 letter to employees acknowledged that it was aware of their union activities. The record reflects that the Respondent had been studying wages in connection with the distribution employees but there is no evidence to sustain a finding of what that survey revealed. Thus, the Respondent presented no evidence relative to who did the wage survey, what information the survey sought, when it was conducted, when it was finalized, what the survey results showed, how the amounts of increases were calculated and who made the decision regarding the amount and timing of the increases. Additionally, the Respondent did not provide evidence regarding the reasoning and timing of the granting, for the first time, of a night differential for the distribution center employees. The Respondent simply chose not to call any witnesses concerning these questions. The Respondent bears the burden of proving these matters when wage increases are given to employees immediately upon learning of their union activity.

I find that the record shows the amounts of the June 1 hourly increases were substantial, particularly when compared to prior wage increases. The timing of the increases was not consistent with past raises. No evidence demonstrates that the raises were decided upon prior to the Respondent's knowledge of the employees' union activities. The $.25 per hour night-shift differential was a new benefit that applied to approximately 55 of the 60 unit employees. Thus approximately 91 percent of the distribution employees received this additional pay raise. The Respondent's bare assertion that raises were delayed because the human resources department was busy does not meet its burden of showing by definitive evidence that the raises were not designed to interfere with the employees' union activities. The Respondent did not provide adequate evidence sufficient to overcome the presumption that it was granting wage increases and a night-shift differential increase, at least in part, to unlawfully curtail the Union's organizational campaign. I find, therefore, that the grant of these wage increases is a violation of Section 8(a)(1) of the Act.

G. Analysis of Promises of Benefits

The Government alleges that on June 1, Baker's statements to employees amounted to unlawful solicitation of grievances in order to interfere with their union activities. The Respondent asserts that no promises were made to remedy any of the employees' complaints and thus the Respondent did not violate the Act.

The relevant principles regarding the solicitation of grievances are well established and were recently summarized in *Maple Grove Health Care Center*, 330 NLRB 775 (2000), as follows:

> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one.

The Respondent not only made statements promising to look into the employees' grievances, it also followed up by meeting with workers and sending the June 7 letter that was a further solicitation regarding their concerns. The Respondent presented insufficient evidence that rebuts the inference that it was going to remedy the employees' grievances and that such solicitations were designed to interfere with the employees' union activities. I find that the Respondent violated Section 8(a)(1) of the Act by soliciting the employees' grievances on June 1, 2000. *Reliance Electric Co.*, 191 NLRB 44, 46 (1971).

H. Additional 8(a)(1) Violations

The Government alleges that the Respondent has committed several other violations of the Act regarding its campaign against the Union. The Respondent denies that it has violated the Act with regard to the additional allegations.

One such allegation asserts that the Respondent's letters of June 7 and 16 unlawfully solicited the employees to withdraw their union authorizations. The Board in *R. L. White, Inc.*, 262 NLRB 575, 576 (1982), set forth the standard for considering an employer's conduct regarding telling employees about resigning from the union. The Board stated that an employer does not violate the Act by merely providing employees with information on how to resign from the union "as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." The Board has found violations where unrequested advice about revoking union authorizations has been accompanied by employer assistance in the actual mechanics of the revocation, *Deutsch Co.*, 180 NLRB 8, 20 (1969), and where the advice was given in the context of other unfair labor practices. *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 119 (1979); *L'Eggs Products, Inc.*, 236 NLRB 354, 389 (1978). Here, the Respondent offered the revocation advice in accompaniment with its unlawful granting of wage increases, solicitation of employee grievances, and as

detailed below, the unlawful discharge of Kama Cox. I find that, in the context of its unlawful conduct, the Respondent's soliciting the employees to withdraw their union authorizations was a violation of Section 8(a)(1) of the Act.

The Government alleges that the June 7 and 16 letters also unlawfully created the impression of surveillance of employees' union activities. In the June 7 letter Baker stated: "I am encouraged that some employees have already requested that their union signature cards be withdrawn." In the June 16 letter, Baker stated: "Several Distribution Department employees have shared with their supervisors that those pushing the union petition have refused to remove their signature at their request." The statement contained in the June 16 letter does nothing more than report what employees told supervisors. I find that this statement does not unlawfully create the impression of surveillance of employees' union activities. In contrast, the statement in the June 7 letter cites no source for Baker's knowledge that some employees had requested their signatures be withdrawn. This tends to restrain and coerce employees by reasonably giving them the sense that their union activities are being surveilled by the Respondent. I find, therefore, that the June 7 letter did create the impression of surveillance and is a violation of Section 8(a)(1) of the Act.

Finally, the Government alleges that by serving pizza to the employees at the June 1 meeting the Respondent was further trying to unlawfully interfere with their union activities. The record establishes that the Respondent had provided refreshments to employees at past meetings. While the Government debates the comparative quality of those refreshments, I find that the Respondent's serving of pizza at the June 1 meeting was not unlawful interference, and the Respondent did not violate the Act by such conduct.

VI. THE DISCHARGE OF KAMA COX

Kama Cox worked for the Respondent on two occasions. She was first employed from September 21, 1999, to January 19, 2000, as a part-time additional employee. Cox is a single mother and was attending school while working for the Respondent. She admittedly had some problems working the night shift while at the same time meeting her family and school responsibilities. Cox was not warned or disciplined about any attendance problems during her first period of employment. Cox voluntarily resigned her employment on January 19, 2000.

In April 2000, Cox again sought employment with the Respondent. She was immediately hired and started work on April 6. Cox was active in the union organizing activity. She signed the union authorization petition, was on the union organizing committee, attended union meetings, and actively solicited employees to sign the authorization petitions.

On June 3, Cox called in sick with a severe allergy/asthma attack. On June 5, Cox telephoned Supervisor Steve Carlson and reported that she was unable to get a doctor's appointment until 2 p.m. the following day and would need to leave work early. Cox testified that Carlson said she could not leave work early because they had a "run" (apparently this is an extra load of work). Cox argued there was no run on the schedule and they never had runs on Tuesdays. Carlson told Cox she could work the whole day or she could take the whole day off. Cox said that she needed to get to the doctor and would take the entire day off.

On June 6, Cox telephoned the Respondent's human resources department and asked about its policy regarding employees leaving work early. She was told to talk to Supervisor LaCamp. Cox asked LaCamp about her question and he told her that he did not know of any policy on the subject. He stated that he thought such matters were left to the supervisor's discretion. Cox complained to LaCamp about Carlson denying her permission to leave early for the doctor's appointment. LaCamp told her to take the matter up with her manager, Strub, when he returned from vacation the following week.

Cox testified that she knew that other employees had been allowed to leave work early for medical appointments and cited the example of employee Rob Warner leaving early for a dental appointment. Carlson did not testify at the hearing and the Respondent offered no evidence relating to his refusal to allow Cox to leave work early for the medical appointment. The Respondent offered no evidence relative to any policy about leaving work early.

On June 6, Cox went in to the Respondent's facility to give Carlson a note from her doctor and to pick up her paycheck. At that time Cox learned that, contrary to Carlson's stated reason for not allowing her to leave early, there had been no run performed on June 6. Cox's testimony in this regard was uncontroverted by the Respondent.

On June 7, Cox was called at work by her son's day care provider and informed that he was ill. Carlson gave Cox permission to leave work to get her son. On June 8, Cox telephoned Carlson and notified him that her son was still ill and she would not be at work that day. Her son's illness continued on June 9 and again she telephoned Carlson to inform him she would be absent from work that day. Carlson told her he would see her on Tuesday, June 13, her next scheduled workday.

On June 10 Union Representative Ostrach mailed invitations to unit employees for a "bring your own pizza" party to be held on June 14 at the union hall. The invitation listed the names of the five employee organizing committee members. Cox's name was one of the five listed. The record reflects that the invitations were delivered to employee homes on June 12.

Cox went to work as scheduled on Tuesday, June 13. When Cox got out of her car in the parking lot she was met by Supervisors Carlson and Strub. Cox started to hand Strub the doctor's excuse reflecting her son's illness, but he refused to accept the note. The men told Cox that she was being discharged because she had failed her probationary period. Cox was not told what she had done to fail her probationary period.

Cox candidly admitted that she was occasionally late to work. Cox's personnel file contained no warnings about potentially failing her probationary period and no absences in the file were unexcused or a "no call/no show" absence. Cox testified that the Respondent had never warned her that she was in danger of losing her job. Neither Carlson nor Stub testified at the trial. The Respondent offered no witnesses to state the Respondent's decision-making process or specific reasons why Cox was terminated.

No evidence was presented that the Respondent has a written policy concerning the number of absences or tardies that an

employee is allowed before she is warned or disciplined. The record contains several examples of employees who were absent or tardy on numerous occasions, including having unexcused absences and "no call/no show" absences. These employees were not disciplined or terminated. The Respondent offered no evidence to refute these examples or to explain the disparity in treatment received by Cox.[4]

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Electromedics, Inc.*, 299 NLRB. 928, 937 (1990), enfd. mem. 947 F.2d 953 (10th Cir. 1991); *Presbyterian/St. Luke's Medical Center*, 723 F.2d 1468, 1478–1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Cox was a union organizing leader and this fact was widely known in the plant. The evidence shows that the Respondent was immediately aware of the union activity at the plant. Thus, Baker's May 31 letter states: "It has been brought to my attention that a few employees have been talking about representation by a Union." Cox's discharge occurred directly after her name appeared on the Union's meeting invitation. Cox was unexplainably denied permission to leave work early for a doctor's appointment shortly after her union activity began. Cox was presumably discharged for poor attendance, yet no specifics of how she failed to meet the Respondent's work standards was presented. The Respondent chose not to explain the disparate treatment that Cox received when compared to other employees with attendance deficiencies. The Respondent chose not to introduce evidence explaining the reasoning and timing for her discharge. The Respondent chose not to introduce any evidence denying that it had knowledge of Cox's union activities. I infer from these factors and the record as a whole that the Respondent was aware that Cox was a leader in the union organizing efforts at the plant. *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046–1049 (1985); *Famet, Inc. v. NLRB*, 490 F.2d 293 (9th Cir. 1973).

Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence would be unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an adverse inference is appropriate in this case. I find that had the Respondent called witnesses to testify concerning its reasons for terminating Kama Cox that testimony would have been contrary to the Respondent's defense that it did not unlawfully discharge Cox because of her union activities. *International Automated Machines*, 285 NLRB 1122, 1122–1123 (1987).

The Respondent, as set forth herein, has been found to have committed other unfair labor practices. I find, therefore, that the Government has proven the requisite union activity, knowledge, animus, and timing with regard to the discharge of Kama Cox. I further find that the Respondent has failed to show that Cox would have been discharged regardless of her union activities. I conclude, therefore, that the Respondent discriminatorily discharged Kama Cox on June 13 in violation of Section 8(a)(1) and (3) of the Act.

VII. BARGAINING ORDER REMEDY

The Government argues that a bargaining order is the appropriate remedy for the Respondent's unfair labor practice violations. The Respondent opposes such a remedy. In *Gissel*, supra, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')." *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996). The Supreme Court stated that in fashioning a remedy in the exercise of its discretion in category II cases, the Board "can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." 395 U.S. at 614–615.

An examination of the Respondent's conduct in this case reveals that a *Gissel* bargaining order is justified. The Union had signed authorizations from a majority of the unit employees on June 1. The Respondent's unfair labor practices include the unlawful discharge of Kama Cox, a leading union advocate. As noted, her discharge was timed to occur the day before the Union's June 14 employee meeting. *NLRB v. Carlton's Market*,

[4] The Respondent moved to strike Cox's testimony because in an affidavit she gave the Government there is a reference to attached "letters" she had received from the Respondent. There was a question as to precisely what the attachments were. After consideration of the record and Cox's testimony it is apparent that the discrepancy, if any, is minor. The Respondent was given a full opportunity to examine Cox and to inquire of the Government about the matter. It remains unclear if there was more than one letter attached to the affidavit or if the reference in the affidavit was an error. Respondent has not shown how it was prejudiced by this confusion and I find the matter is not sufficient grounds to strike Cox's testimony. I, therefore, deny the Respondent's motion to strike her testimony.

642 F.2d 350, 354 (9th Cir. 1981) (employees are unlikely "to miss the point that backpay and offers of reinstatement made some 9 to 11 months after the discharge does not necessarily compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment"); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980).

The Respondent's highest ranking official, Publisher, Tony Baker, was shown to have had a direct part in some of the unlawful activity including the announcement of the pay raises, creating the impression of surveillance of the employees' union activities, soliciting the employees to withdraw support from the Union, and the solicitation of employee grievances. Baker commenced the Respondent's unlawful conduct immediately upon learning of the employees' union activities and voiced his strong hostility towards union representation for the distribution workers in the communications he transmitted to the employees. *M. J. Metal Products*, 328 NLRB 1184, 1185 (1999); *Consec Security*, 325 NLRB 453, 455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999) ("[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten").

The unlawful grant of the wage increases effected every unit employee and was a powerful weapon in the Respondent's antiunion campaign. As the Board stated in *Parts Depot, Inc.*, 332 NLRB 670, 675 (2000):

> [T]he effects of an unlawfully granted wage increase are particularly difficult to remedy by traditional means.
>
> Unlawfully granted benefits have a particularly long-lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees. *Color Tech Corp.*, 286 NLRB 476, 477 (1987). Further, the benefits unlawfully granted will serve as a reminder to the employees that the Respondent, not the Union, is the source of such benefits and that they may continue as long as the employees do not support the Union. (*Gerig's Dump Trucking*, 320 NLRB 1017, 1017–1018 (1996), enfd. 137 F.3d 936 (7th Cir. 1998).)[5]

Finally, the Respondent committed other serious and pervasive unfair labor practices in its attempt to discourage support for the Union—creating the impression of surveillance of their union activities, unlawfully urging employees to revoke union authorizations, and solicitation of employee grievances. All of this conduct was directed against every employee in the unit. There is nothing in the record that suggests the Respondent would not continue to engage in such widespread unlawful conduct in the future if it would suit its ends in defeating union representation of its employees.

Taking all of these factors into consideration, I find that the Respondent's unlawful conduct clearly demonstrates that the holding of a fair election in the future would be unlikely and that the employees' wishes are better gauged by the Union's card majority rather than by an election. *Sahara Datsun, Inc. v. NLRB*, 811 F. 2d 1317, 1321–1322 (9th Cir. 1987). I find that the bargaining order shall date from June 1, 2000, the date that the Respondent commenced its campaign of unfair labor practices. *Joy Recovery Technology Corp.*, 320 NLRB 356 fn. 4 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998).[6]

VIII. THE UNION'S BARGAINING DEMAND AND INFORMATION REQUEST

On September 26, 2000, the Union's attorney, David A. Rosenfeld, sent a letter to Baker demanding that the Respondent bargain with the Union regarding the distribution department employees. The letter stated that the request was retroactive to June 1, 2000. Rosenfeld's letter also requested certain information regarding unit employees, company policies relating to wages, hours, and working conditions, copies of fringe benefit plans, and current job descriptions.

On September 27, Baker replied to Rosenfeld's letter denying that the Union represented any of the Respondent's employees. Baker rejected the Union's request for bargaining and denied the request to provide the information sought. The Government alleges the refusal to bargain and provide the information is a violation of the Act. The Respondent asserts it had no duty to supply the information because the Union did not represent its distribution employees.

A bargaining order remedy has been directed against the Respondent from the date of the commencement of its unfair labor practices, i.e., June 1. *Regency Manor Nursing Home*, 275 NLRB 1261 fn. 5 (1985). Under Section 8(a)(5) and (d) of the Act, as interpreted by the Supreme Court, an employer is obligated to furnish a union with sufficient relevant information, on request, to enable the union to represent its employees effectively in collective-bargaining negotiations. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). I find that the Union's requested information is relevant and necessary to its collective bargaining with the Respondent. The Respondent's September 27 refusal to recognize and bargain with the Union and to supply information is contrary to the bargaining order remedy. I find that the Respondent violated Section 8(a)(1) and

[5] See also *Anchorage Times*, 637 F.2d 1359, 1370 (9th Cir. 1981).

[6] The Respondent's brief makes passing mention of employee turnover in the unit as a possible reason for denying a bargaining order remedy. The record evidence of turnover is scant and the Board does not normally accept such an argument. *Garvey Marine, Inc.*, 328 NLRB 991, 995–996 (1999) ("The Board traditionally does not consider turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy based on the situation at the time the unfair labor practices were committed."). Regardless, I find that the record does not support the conclusion that the effects of the Respondent's unlawful conduct are likely to be sufficiently dissipated by turnover to ensure a free and fair future election. Although some employees who were employed at the time of the unlawful conduct may have left the Respondent's employment for reasons related or unrelated to its unfair labor practices, others who remain would recall these events. Moreover, as noted above, the lingering effects of a generous across-the-board wage increase and the unlawful discharge of a leading union advocate are particularly difficult to dispel.

(5) of the Act by refusing to bargain with the Union and to provide it the requested relevant information.

CONCLUSIONS OF LAW

1. The Guard Publishing Company, d/b/a The Register Guard, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Teamsters Local Union No. 206, affiliated with the International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1), (3), and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, The Guard Publishing Company, d/b/a The Register Guard, Eugene, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating, disciplining, and/or taking any other adverse actions against employees because they engage in activities in support of Teamsters Local Union No. 206, affiliated with the International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, or engage in protected concerted activities.

(b) Providing increased benefits to employees to encourage them to refrain from supporting and/or assisting the union.

(c) Soliciting complaints and grievances and thereby implying that Respondent will provide improved benefits to employees if they refrain from supporting and/or assisting the Union.

(d) Creating the impression of surveillance of employees' union activities.

(e) Soliciting employees to withdraw their signatures from the Union's petitions.

(f) Refusing to bargain with Teamsters Local 206 as the exclusive collective-bargaining representative of employees in the unit listed below.

(g) Refusing to provide the Union with necessary and relevant information it requests for the conduct of its duties as the collective-bargaining representative of our distribution employees.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kama Cox full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Kama Cox whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Kama Cox, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1137 (1999).

(e) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All distribution employees employed by the Employer at its Eugene, Oregon location; excluding office clerical employees, transportation helpers, bundle haulers, professional employees, guards and supervisors as defined in the Act.

(f) Immediately provide the Union with the information it requested in its September 26, 2000, letter.

(g) Within 14 days after service by the Region, post at its facility in Eugene, Oregon, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

any time since June 1, 2000. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: April 5, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate, discipline and/or take any other adverse actions against employees because they engage in activities in support of Teamsters Local Union No. 206, affiliated with the International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, or engage in protected concerted activities.

WE WILL NOT provide increased benefits to employees to encourage them to refrain from supporting and/or assisting the Union.

WE WILL NOT solicit complaints and grievances from our employees and thereby imply that we will provide improved benefits to employees if they refrain from supporting and/or assisting the Union.

WE WILL NOT create the impression of surveillance of our employees' union activities.

WE WILL NOT solicit employees to withdraw their signatures from the Union's petition, and therefore, withdraw their support from Teamsters Local 206 or any other labor organization.

WE WILL NOT refuse to bargain with, or to provide required information to, Teamsters Local 206, the collective-bargaining representative of our employees employed in the distribution center.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Kama Cox full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kama Cox whole, with interest, for any loss of pay and other benefits she suffered as a result of our unlawful termination of her.

WE WILL remove from our files, including the personnel file of Kama Cox, any reference to the unlawful discharge of Kama Cox and notify Cox, in writing, that this has been done and that the termination will not be used against her in any way.

WE WILL, upon request, bargain in good faith at reasonable times and places with Teamsters Local 206, the exclusive collective-bargaining representative of our employees in the following unit with respect to pay, wages, hours, and other terms and condition of employment, and, if an agreement is reached, we will embody such understanding in a signed agreement. The appropriate collective-bargaining unit is:

> All distribution employees employed by the Employer at its Eugene, Oregon location; excluding office clerical employees, transportation helpers, bundle haulers, professional employees, guards and supervisors as defined in the Act.

WE WILL promptly provide information requested by Teamsters Local 206 that is necessary and relevant for the Union to perform its duties as collective-bargaining representative of our distribution employees.

THE GUARD PUBLISHING COMPANY, D/B/A THE REGISTER GUARD